

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
 : Docket #14m2848
UNITED STATES OF AMERICA, :
 :
Plaintiff, :
 :
- against - :
 :
GIBRON LOPEZ, et al., : New York, New York
 : December 19, 2014
Defendants. :
 :
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PROCEEDINGS BEFORE
THE HONORABLE ANDREW J. PECK,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For the United States U.S. ATTORNEY'S OFFICE
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E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-Direct</u>	<u>Re-Cross</u>
None				

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

1 THE COURT: U.S. v. Jose Cortez, Jose Rodriguez,
2 Luis Guerrero, Gibron Lopez. Counsel, state your name for
3 the record starting with the Government.

4 MS. MARGARET GARNETT: Good afternoon, Your
5 Honor, Margaret Garnett for the United States. With me is
6 Special Agent Amanda Schweiner from the ATF.

7 MR. MARK GOMBINER: Mark Gombiner, Federal
8 Defenders, for Mr. Jose Ortiz. Good afternoon, Judge.

9 MR. DAVID TOUGER: Good afternoon, Your Honor,
10 David Touger for Mr. Gibron Lopez.

11 MR. JOSHUA DRATEL: Good afternoon, Joshua Dratel
12 for Jose Rodriguez.

13 MR. STEWART ORDEN: Your Honor, Good afternoon,
14 Stewart Orden on behalf of Mr. Guerrero.

15 THE COURT: All right, let me now advise all the
16 defendants of certain rights that you have. This is not a
17 trial. You're not called upon to answer the charges
18 against you at this time.

19 You have the right to remain silent. You're not
20 required to make any statements. Even if you've already
21 made any statements to the authorities, you need not make
22 any further statements. Anything you do say can be used
23 against you.

24 You have the right to be released eitehr
25 conditionally or unconditionally pending trial, unless I

1 find that there are no conditions that would reasonably
2 assure your continued presnce in court and the safety of
3 the community. If the prosecutors ask me to detain you
4 pending trial, you're entitled to a prompt hearing on
5 whether those conditions exist.

6 Starting with Mr. Ortiz, do you understand all of
7 these rights?

8 MR. ORTIZ: Yes, I do.

9 THE COURT: All right, does Mr. Ortiz need an
10 interpreter?

11 MR. GOMBINER: Yeah.

12 THE COURT: Okay. Fortunately, the best of our
13 staff language interpreters is standing right here. All
14 right, Mr. Ortiz, do you understand these rights?

15 MR. ORTIZ: Yes.

16 THE COURT: Mr. Lopez, do you understand these
17 rights?

18 MR. LOPEZ: Yes, Your Honor.

19 THE COURT: And Mr. Rodriguez.

20 MR. RODRIGUEZ: (indiscernible)

21 THE COURT: Excuse me?

22 MR. RODRIGUEZ: Yes, Your Honor.

23 THE COURT: Thank you. And, Mr. Guerrero, do you
24 understand these rights?

25 MR. GUERRERO: Yes, Your Honor.

1 THE COURT: You each have the right to be
2 represented by counsel during all court appearances and
3 during any and all questioning by the authorities. If you
4 cannot afford an attorney, I will appoint one today to
5 represent you throughout this case at no cost to you. Mr.
6 Guerrero, do you understand your rights to counsel?

7 MR. GUERRERO: Yes, sir.

8 THE COURT: And, Mr. Rodriguez, do you understand
9 your rights to counsel?

10 MR. RODRIGUEZ: Yes, sir.

11 THE COURT: And, Mr. Lopez, do you understand
12 your right to counsel?

13 MR. LOPEZ: Yes, Your Honor.

14 THE COURT: And Mr. Ortiz?

15 MR. ORTIZ: Yes, Your Honor.

16 THE COURT: All right, let's start with Mr.
17 Guerrero. Please stand. And actually it needs, Mr. Orden,
18 it needs to be signed. So while he's doing that, let's go
19 to Mr. Rodriguez. Please stand. Is this your signature on
20 the financial affidavit?

21 MR. RODRIGUEZ: Yes, sir.

22 THE COURT: Raise your right hand please. Do you
23 solemnly swear that the information in your financial
24 affidavit is true, complete, and correct, so help you God?

25 MR. RODRIGUEZ: Yes, sir.

1 THE COURT: Very good. Be seated, I approve your
2 application and appoint Mr. Dratel to represent you.

3 Okay, now we're back to Mr. Guerrero. Please
4 stand. Obviously, this is your signature on the financial
5 affidavit, correct?

6 MR. GUERRERO: Yes, sir.

7 THE COURT: Raise your right hand. Do you
8 solemnly swear the information in your financial affidavit
9 is true, complete, and correct, so help you God?

10 MR. GUERRERO: Yes, Your Honor.

11 THE COURT: All right, I approve your application
12 and appoint Mr. Orden to represent you. Mr. Lopez, please
13 stand. Is that your signature?

14 MR. LOPEZ: Yes, it is.

15 THE COURT: Raise your right hand. Do you
16 solemnly swear that the information in your financial
17 affidavit is true, complete, and correct --

18 MR. LOPEZ: Yes, it is, Your Honor.

19 THE COURT: Very good, I approve your application
20 and appoint Mr. Touger to represent you. And, finally, Mr.
21 Ortiz, please stand. Is this your signature on the
22 financial affidavit?

23 MR. ORTIZ: Yes.

24 THE COURT: Raise your right hand. Do you
25 solemnly swear that the information in your financial

1 affidavit is true, complete, and correct, so help you God?

2 MR. ORTIZ: Yes.

3 THE COURT: All right, I approve your application
4 and appoint Mr. Gombiner to represent you. Give me a
5 moment here.

6 (pause in proceeding)

7 THE COURT: Okay, Agent, is it Schweiner?

8 AGENT SCHWEINER: Yes, sir.

9 THE COURT: Please stand, raise your right hand.
10 Do you solemnly swear that the information in the complaint
11 is true and correct?

12 AGENT SCHWEINER: I do.

13 THE COURT: Be seated. Mr. Gombiner, have you
14 received a copy of the complaint?

15 MR. GOMBINER: Yes, I have, Judge, I reviewed the
16 substance of it with Mr. Ortiz. We waive its public
17 reading.

18 THE COURT: All right, Mr. Touger.

19 MR. TOUGER: Yes, Your Honor. I reviewed the
20 complaint with Mr. Lopez, and I waive its public reading.
21 And it's Touger, by the way.

22 THE COURT: Sorry.

23 MR. TOUGER: That's okay, nobody gets it.

24 THE COURT: Mr. Dratel.

25 MR. DRATEL: Yes, Your Honor, we have reviewed it

1 with Mr. Rodriguez, waive its public reading.

2 THE COURT: And, finally, Mr. Orden.

3 MR. ORDEN: The same, Your Honor, except I
4 reviewed it with my client.

5 THE COURT: All right, very good. All right,
6 each of you, each of the defendants has a right to a
7 preliminary hearing at which the prosecutors will have the
8 burden of establishing that there is probable cause to
9 believe that the crime being charged was committed and that
10 you are one of the persons who committed it. If probable
11 cause is established, the prosecutors get to go to trial
12 against you. If probable cause is not established, the
13 Court will dismiss the charges.

14 If you remain in custody, the preliminary hearing
15 will be held within 14 days; if you're not in custody, it
16 will be held within 21 days, unless under either situation
17 you, through your attorney, agree to have the hearing 30
18 days from today. I should advise you that a preliminary
19 hearing will not be held if, before the date it's
20 scheduled, you're indicted by a grand jury or if the
21 prosecutors with your and your attorneys' permission file a
22 criminal information against you. And traditionally one of
23 those two things is what happens in this district.

24 I'll set the preliminary hearing date in a moment
25 after addressing the issue of bail with counsel. What is

1 the Government's position on bail?

2 MS. GARNETT: Your Honor, the Government's
3 seeking detention for all four defendants.

4 THE COURT: All right, Mr. Gombiner, are you
5 prepared to proceed at this time?

6 MR. GOMBINER: Judge, based on Mr. Ortiz's parole
7 status, we don't have any application at this time.

8 THE COURT: All right, detention as to Mr. Ortiz
9 ordered on consent without prejudice to any future bail
10 application. Preliminary hearing date, Mr. Gombiner.

11 MR. GOMBINER: Fourteen days.

12 THE COURT: All right, January 5. Okay, next, as
13 to Mr. Lopez, are you ready to proceed, counsel?

14 MR. TOUGER: Yes, Your Honor.

15 THE COURT: All right, let's hold that for a
16 minute. As to Rodriguez, Mr. Dratel.

17 MR. DRATEL: Yes, we're ready to proceed.

18 THE COURT: All right, and as to Guerrero, Mr.
19 Orden, are you ready to proceed?

20 MR. ORDEN: I am, Your Honor, I think my
21 colleagues want me to proceed first.

22 THE COURT: All right, well, first, we hear from
23 the Government. So let's hear from the Government.

24 MS. GARNETT: As Your Honor knows from reading
25 the complaint, this is a presumption, a case that carries

1 the statutory presumption of detention. In addition, Your
2 Honor, I think the charges in the complaint are very
3 serious. Both Mr. Lopez and Mr. Guerrero are openly
4 discussing repeatedly in recorded conversations the
5 expectation that the anticipated victims of the robbery
6 would have to be killed as part of the robbery and that
7 they were prepared to do so. Indeed, it was Mr. Lopez who
8 first initiated discussion of the possibility that people
9 would have to be killed.

10 Mr. Lopez was the initiator of the robbery. It's
11 true that as the plan proceeded it was a sting in control
12 of the Government, but the entire plan was initiated by Mr.
13 Lopez proposing to the CI that he work with him to carry
14 out a drug robbery. In addition, Mr. Lopez and Mr.
15 Guerrero over multiple meetings were actively involved in
16 moving the plan forward, and Mr. Rodriguez was also a
17 participant in certain of those conversations, although
18 joining later than Mr. Lopez and Mr. Guerrero.

19 With respect to Mr. Lopez, he has four prior bench
20 warrants. He's currently unemployed. And we respectfully
21 submit, with regard to Mr. Lopez, that he presents both a
22 danger to the community and a significant risk of non-
23 appearance.

24 Mr. Guerrero's also unemployed. He has a prior
25 robbery felony, admittedly as a juvenile, but, nonetheless,

1 a prior armed robbery, as well as a 2008 bench warrant.
2 And given all the factors and in particular the offense
3 conduct, we think he's also a strong candidate for
4 detention.

5 Mr. Rodriguez had his probation revoked in 2008,
6 and he also has a pretty significant arrest and conviction
7 history, and given the nature of the offense and his open
8 discussion of violence, two loaded firearms in the car, and
9 his criminal history, we think he's also a strong candidate
10 for detention.

11 THE COURT: All right, Mr. Orden, you said your
12 colleagues gave you the short straw, so go ahead.

13 MR. ORDEN: They did, Judge. Perhaps the best
14 straw. I understand Your Honor has to review the bare
15 contents of the complaint, and one doesn't know yet what
16 the actual recordings will reveal. I think a number of the
17 quotes attributed to my client, first of all, are subject
18 to interpretation in terms of what actually may have said.
19 It's coded language which they chose to interpret a
20 particular way. But notwithstanding that, I understand
21 what you're left with, which is the flat complaint itself.

22 But I think one of the things you have to assess
23 in assessing my client is likelihoods. My client when he
24 was 14 years old had his first and only brush with anything
25 resembling violence. I can't tell what that is from really

1 reading it. It seems to me that it's a bunch of 14 years
2 old beating up and taking something from another youth, but
3 that was adjudicated a youthful offender. That's over 11
4 years ago when he was 14. So that's it. Since then he's
5 had two extremely minor brushes with the law.

6 So I would ask you to consider, given the nature
7 of the charges and what they allege my client to have been
8 engaged in and what the specific language may or may not
9 have been and what he did here, what is the likelihood that
10 my client actually had in his mind that which they suggest.
11 He's 26 years old, he's never virtually been in trouble
12 with the law since he was 14. His status in the community
13 has been --

14 THE COURT: Well, other than two prior drug
15 collars and actually both are convictions.

16 MR. ORDEN: They were disorderly conduct
17 violations, Your Honor. One was the possession as a class
18 B misdemeanor, which is a nothing in the State of New York
19 in terms of drug quantity, and the other, while they
20 charged as a felony, they reduced it to a disorderly
21 conduct violation which tells you something about the
22 seriousness and the actual truth of those original charges.
23 While they do tend to reduce things in New York State, they
24 don't reduce class B felonies to sell narcotics to
25 violations and (inaudible) when they're serious.

1 So with all due respect, I think that more
2 accurately reflects what he's done since --

3 THE COURT: Based at least on danger, do you have
4 a significant package?

5 MR. ORDEN: What I have, Your Honor, first of
6 all, is that the information I know that Pretrial tried to
7 reach his girlfriend. She's here in court today --

8 THE COURT: That doesn't help me if it's not
9 verified in the report, which raises the question of, and
10 this will go for the other two defendants, whether you're
11 better off making an on-the-fly bail package suggestion and
12 now and possibly losing --

13 MR. ORDEN: I'll make it now. She can
14 corroborate everything. They couldn't reach her because
15 she was in the courtroom. They take her phone. Her
16 mother's in the courtroom and a friend of the family who
17 are --

18 THE COURT: All right, what's your package?

19 MR. ORDEN: Five financially responsible people
20 to cosign a bond in the amount that the Court deems
21 sufficient --

22 THE COURT: What amount do you suggest?

23 MR. ORDEN: Hundred thousand dollars, Your Honor.

24 THE COURT: And do the five people collectively
25 earn in excess of a hundred thousand?

1 MR. ORDEN: I would have to ask. I see his
2 girlfriend is shaking yes, her head yes. May I have 30
3 seconds?

4 THE COURT: Very briefly, which is why I was
5 suggesting you might want to put this off.

6 MR. ORDEN: Yes, Your Honor. Five financially
7 responsible people that earn in excess of a hundred
8 thousand dollars.

9 THE COURT: Okay. What else?

10 MR. ORDEN: That's all I have to offer, Judge. I
11 don't think that's going to get any better which is why I'm
12 doing it on the fly.

13 THE COURT: All right, let me hear from the
14 Government as to Guerrero. Anything further?

15 MS. GARNETT: Judge, I think the proposed bail
16 package does almost nothing to address the danger to the
17 community issue. Where the proof on Mr. Guerrero is very
18 strong, I think detention's warranted.

19 THE COURT: All right, let me think about it.
20 Next, who goes next under your sharing deal.

21 MR. TOUGER: I'll go next, Your Honor.

22 THE COURT: Go ahead.

23 MR. TOUGER: Your Honor, (inaudible) on behalf of
24 Gibron Lopez. First, let me deal with the issue of the
25 bench warrants that's in his criminal history. If you

1 notice, Your Honor, both times he was arrested for
2 obviously very minor charges, he pled guilty the day after
3 he was arrested in court. And then the bench warrants came
4 because he was sentenced to pay a fine of \$75 on the
5 marijuana case, and my client tells me on (indiscernible)
6 convicted of disorderly conduct, which is not even a crime,
7 it's a violation, the fine there was \$50 and one day of
8 community service. And when he did not have the \$50 to
9 pay, he didn't show up in court, not knowing that he could
10 get an adjournment. And that's why, if you see, what he
11 did was (indiscernible), he was given a five-day term of
12 incarceration as opposed to a \$50 fine. And the same thing
13 happened with the marijuana case, although ultimately he
14 did pay the \$75 fine.

15 So the bench warrants that were issued were not in
16 the case that's actually pending. They were while he was
17 trying to get the money together.

18 THE COURT: That still doesn't make me confident
19 that he's going to be here when he has to. But continue.

20 MR. TOUGER: Finally, Your Honor, my client has
21 never lived anywhere else but New York. He's lived with
22 his mother for basically his entire life except for a stint
23 in the United States Army. He has no ties to any other
24 community, no relatives anywhere else but New York City.
25 And I would ask Your Honor that you, along with what

1 Pretrial Supervision recommends, that you set a bond in the
2 amount of \$100,000 which we would add to that, Your Honor,
3 that he be given house arrest. Therefore, it would pose no
4 threat to the community as he would be confined to his
5 home, except to come to court and to see me on the approval
6 of the court, I mean of Pretrial Services. We'd ask for
7 the same \$100,000 bond with house arrest.

8 THE COURT: How many cosigners do you have if I
9 were going to grant bail?

10 MR. TOUGER: The most he could get, Your Honor,
11 would be three.

12 THE COURT: Okay. Anything further from the
13 Government on Mr. Lopez?

14 MS. GARNETT: Judge, only that we don't think
15 that, as Your Honor is well aware, that detection with
16 electronic monitoring is far from perfect, and we don't
17 think that, given Mr. Lopez's role and the seriousness of
18 the conduct, that it's sufficient to address the risk of
19 danger to the community.

20 THE COURT: All right. Finally, as to Mr.
21 Rodriguez.

22 MR. DRATEL: Thank you, Your Honor. We'll start
23 out with the allegations because they really don't apply to
24 Mr. Rodriguez in terms of the complaint. The complaint is
25 quit thin, insufficient at all with respect to Mr.

1 Rodriguez. He doesn't appear until paragraph 19 in the
2 factual recitation. And there's only discussion here of
3 drugs and drug pricing. There's no discussion of robbery,
4 there's no discussion of weapons, there's no discussion of
5 violence. And like I said, I don't know that it even makes
6 out a robbery case at all, and even if it makes a drug case
7 or a conspiracy at all.

8 So on the facts of the case, there's a substantial
9 difference here in the conduct that's alleged. He's a
10 latecomer; other than the driver, he's the last person
11 involved. He's not involved in any of those preliminary
12 conversations. This is day of, yesterday. So the case
13 against him is thin.

14 THE COURT: Well, I'm not sure I agree with that,
15 but go ahead, what else?

16 MR. DRATEL: He has family here, and, again, same
17 situation, because obviously people don't have phones here,
18 his girlfriend was unable to verify anything, but she's
19 been here since 10 o'clock this morning, since I've been
20 here. And his brother, he has a half brother who's here as
21 well. And they've been waiting all day. They're available
22 as cosigners. There are other family who are not here who
23 we think could be available as cosigners. So I would
24 propose four cosigners, Your Honor. The bond, again, in
25 the amount of a hundred thousand. Home detention,

1 electronic monitoring, strict Pretrial supervision,
2 whatever conditions the Court thought appropriate to impose
3 we would accept.

4 With respect to prior record, there's one
5 substantial conviction obviously in the state court, and
6 what's important about that case, other than the warrants
7 for marijuana possession and the warranting that went on,
8 that someone were to return two days later on a warrant.
9 So it's really a missed court appearance is that for that
10 case where he had a jail term, he reported. There's no
11 warrant in that case with respect to that. So he has been
12 responsible. The most important the case has been, the
13 more responsible he has been. So it's really sort of
14 counterintuitive.

15 And there are a couple of issues that are listed
16 as recent in the Pretrial report as negatives which I think
17 are really not reasons to deny bail. One is unemployed.
18 That's not a reason to deny bail. The other is marijuana
19 use. It's not a reason to deny bail.

20 And also, I just want to point out that this case
21 reeks of this very, very same scenario that's been covered
22 in two articles in the New York Times in recent weeks, and
23 two courts out west, district courts have dismissed cases
24 for outrageous Government conduct. This conveniently has
25 the initial entreaty coming from one of the defendants

1 rather than the informant. We will see what those
2 conversations show --

3 THE COURT: I'll let you --

4 MR. DRATEL: -- what the evidence shows --

5 THE COURT: I'll let you --

6 MR. DRATEL: -- but this case has that quality to
7 it. So I think all of that makes Mr. Rodriguez, who is a
8 lifelong New Yorker -- and also the other thing about
9 travel, that he has a passport is not a reason to deny him
10 bail. Also, his foreign travel, 2002, this is not an issue
11 for bail in this context. You can't take someone's prior
12 history, pick out the worst of it, and then say that he's
13 not a candidate for bail.

14 THE COURT: Okay, thank you all.

15 MR. DRATEL: Thank you, Your Honor.

16 THE COURT: Unless the Government has anything
17 else to say.

18 MS. GARNETT: Your Honor, if you want to hear
19 from me further, I can comment on Mr. Rodriguez.

20 THE COURT: If you wish, if there's anything to
21 add.

22 MS. GARNETT: The only thing I wanted to point
23 out, Judge, is Mr. Rodriguez's essentially unbroken string
24 of criminal activity in the last ten years. He's twice
25 been on probation or parole and promptly returned to

1 criminal activity. He has a prior felony narcotics
2 conviction, two bench warrants in this year alone. I just
3 don't see that he's a candidate for release.

4 MR. DRATEL: Your Honor, he completed his parole
5 successfully. He's not on supervision currently. He did
6 have probation revoked when he was 19 years old.

7 THE COURT: All right --

8 MR. DRATEL: Seven years ago.

9 THE COURT: All right, the Court sets bail as
10 follows -

11 MR. ORDEN: Your Honor, may I just offer one
12 other thing.

13 THE COURT: Yeah.

14 MR. ORDEN: I don't know if you're setting any
15 bail. But Mr. Guerrero would, if it's a consideration,
16 certainly be amenable to be placed on electronic monitoring
17 and house arrest.

18 (pause in proceeding)

19 THE COURT: All right, Court sets bail for each
20 of the three defendants as follows: a \$250,000 personal
21 recognizance bond cosigned by five financially responsible
22 persons, further secured by a \$25,000 cash or property.
23 Travel restricted to the Southern and Eastern Districts of
24 New York, surrender travel documents, no new applications.
25 Strict Pretrial supervision with drug testing and

1 treatment. Home incarceration with electronic monitoring,
2 each defendant to pay for their electronic monitoring. In
3 addition, they obviously need to have landlines in order to
4 have electronic monitoring. Each defendant to be detained
5 until all conditions are met.

6 Preliminary hearing date for the remaining three
7 defendants. Counsel. Fourteenth day --

8 ATTORNEY: Waive to the 30th day, Your Honor.

9 ATTORNEY: We'll waive to the 30th day, Your
10 Honor.

11 ATTORNEY: Waive to the 30th, Judge.

12 PRETRIAL SERVICES: Your Honor.

13 THE COURT: Yes.

14 PRETRIAL SERVICES: If we can have mental health
15 counseling as a condition of bail for Mr. Lopez. He
16 reported depression.

17 THE COURT: Any objection?

18 MR. TOUGER: No, Your Honor.

19 THE COURT: All right. Thirtieth day is January
20 20. All right, anything else on this matter?

21 MS. GARNETT: Nothing from the Government, Your
22 Honor. Thank you.

23 THE COURT: And obvious the Government or the
24 defense have the right to go to a Part 1 judge. If you do,
25 let me know the results.

1 THE COURT: Okay, next case. Everyone move out
2 on this one quickly and quietly.

3 (Whereupon the matter is adjourned.)
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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, United States of America v. Lopez, Docket #14m2848, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature_____

Date: December 22, 2014